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SAPURA ENERGY BHD & ORS; APPLICANTS v. MARTIN BENCHER (MALAYSIA) SDN BHD; INTERVENER

HIGH COURT MALAYA, KUALA LUMPUR
ATAN MUSTAFFA YUSSOF AHMAD J
[ORIGINATING SUMMONS NO: WA-24NCC-121-03-2023]
B 12 JANUARY 2024

Abstract – *A creditor who submits a proof of debt to the company constructs a legal relationship with the company to be governed by an approved scheme of arrangement, binding that creditor to the scheme. As the inclusion of the creditor in the scheme parameters is not arbitrary but based on its proof of debt submissions and acceptance of the scheme's jurisdiction, changing course to exclude the creditor from the scheme would be an inequitable and improper manoeuvre.*

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COMPANY LAW: *Scheme of arrangement – Corporate restructuring process – Arrangement between debtor companies and its creditors – Creditor seeking exclusion from proposed scheme of arrangement – Whether filing proof of debt constructs legal relationship between creditor and company – Whether binds creditor to sanctioned scheme terms – Whether excluding creditor from scheme an inequitable and improper manoeuvre – Companies Act 2016, ss. 366 & 368*

COMPANY LAW: *Scheme of arrangement – Corporate restructuring process – Arrangement between debtor companies and its creditors – Expiry of convening and restraining orders under first originating summons – Whether application under second originating summons for fresh convening and restraining orders distinct from those granted under first originating summons – Whether convening and restraining orders under second originating summons supported by judicial precedents and legislative intent – Whether legitimate exercise of company's rights – Companies Act 2016, ss. 366 & 368*

G This application concerned a creditor seeking exclusion from a proposed scheme of arrangement between debtor companies and its creditors. A settlement was agreed between the intervener, Martin Bencher (Malaysia) Sdn Bhd ('Martin Bencher') and Sapura Energy Berhad, the first applicant ('Sapura Energy'), Sapura Fabrication Sdn Bhd, the third applicant ('Sapura Fabrication') and Sapura Offshore Sdn Bhd, the fourth applicant ('Sapura Offshore') (all three entities referred to as 'Sapura Entities'). The settlement was to consolidate the separate debts owed to Martin Bencher into an agreed settlement sum of RM223,937.24, USD194,685.55 and EUR102,000 arising from two civil suits, Suit 15 and Suit 482, to be paid in seven monthly instalments. Suit 15 concerned claims by Martin Bencher against Sapura Energy, Sapura Fabrication and Sapura Offshore for unpaid invoices totalling

RM409,242.37 for shipping and freight services provided under three contracts. Suit 482 concerned claims by Martin Bencher against Sapura Energy and Sapura Fabrication for unpaid invoices totalling RM1,140,722.60 for shipping and freight services provided under two contracts. This settlement was arrived at after an exchange of correspondences ('settlement agreement'). Meanwhile, Sapura Energy and 22 subsidiaries ('applicants') had obtained *ex parte* orders in originating summons ('OS 148') to convene creditor meetings within 12 months and restraining actions against the applicants for three months under ss. 366 and 368 of the Companies Act 2016. OS 148 was filed as the group had gone into financial difficulties and required temporary relief from legal proceedings while they attempted to formulate a proposed scheme of arrangement with creditors to restructure the financial affairs and liabilities of the distressed group. On 8 June 2022, the orders were extended by nine months until 10 March 2023 ('the OS 148 convening and restraining orders'). The applicants subsequently invited creditors to submit proofs of debt. On 18 May 2022, Martin Bencher filed proofs of debt under OS 148. On 4 November 2022, Martin Bencher also applied to intervene in OS 148 to ensure proper debt reflection and to be placed in suitable class, which was allowed. With the OS 148 convening and restraining orders expiring on 10 March 2023, on 3 March 2023, the applicants obtained fresh *ex parte* orders in the originating summons ('OS 121') to convene creditors meetings within three months and restraining actions for three months starting 11 March 2023. These were extended by nine months on 6 June 2023 ('the OS 121 convening and restraining orders'). On 17 January 2023, Sapura Fabrication and Sapura Offshore partially rejected Martin Bencher's proofs of debt in OS 148. Subsequently, *via* encl. 139, Martin Bencher applied, *inter alia*, (i) for leave to intervene in the proceedings without limitation and liberty to apply for further reliefs subsequently. This was given by consent; (ii) for the OS 121 convening and restraining orders to be set aside; and (iii) to be excluded from any proposed arrangement and compromise between the applicants and their respective creditors. Martin Bencher submitted that (i) the applicants filed OS 121 in abuse of process and duplicity as they had a separate ongoing originating summons in OS 148; and (ii) through the applicants' own actions, Martin Bencher ought not to have been included in any scheme in the first place. The applicants, however, argued that, *inter alia* (i) the OS 148 convening and restraining orders had expired on 10 March 2023 and were superseded by the OS 121 convening and restraining orders; (ii) Martin Bencher had participated in the proof of debt exercise in OS 148 and thus subjected itself to the jurisdiction of the scheme and adjudication process which carried over to OS 121. Its status as a creditor and debt claims must be determined accordingly, not in separate legal proceedings.

Held (dismissing encl. 139):

(1) The OS 148 convening and restraining orders, which were subject to a time-bound effectiveness, had expired on 10 March 2023. Martin Bencher was allowed to withdraw its application in OS 148, thereby acknowledging that the orders under OS 148 were no longer operative. This expiration negated Martin Bencher's argument of duplicity in proceedings, as by the time OS 121 was initiated, OS 148 had ceased to have any legal effect. (para 17)

(2) The applicants' application under OS 121 for fresh convening and restraining orders, as per ss. 366 and 368 of the Companies Act 2016 ('Companies Act') were distinct from those granted under OS 148. The fresh application did not merely extend the previous orders but represented a new phase in the corporate restructuring process, justified by changes in the restructuring plans and the financial conditions of the company. In other jurisdictions, courts have shown flexibility in allowing fresh applications for convening orders in the context of corporate restructuring schemes, particularly when previous attempts have failed due to various reasons. This court acknowledged the fresh application by the applicants for a restraining order pursuant to s. 368(2) of the Companies Act, even in light of the previous restraining order that had been granted and had since expired. The Companies Act, in sub-s. (2), laid down specific conditions under which the restraining order could be granted and possibly extended. The applicants had satisfied the conditions mentioned in the Companies Act. (paras 18, 19 & 22)

(3) While the Legislature had mandated certain time limits, it did not necessarily imply a bar against subsequent or fresh applications. Adopting a purposive approach, this court recognises the underlying intent of the Legislature, which leans towards ensuring the survival of the company in challenging times, while also safeguarding creditors' interests. The expiration of a previous order does not signify an absolute end but rather provides an opportunity for reassessment based on new circumstances and requirements. (para 25)

(4) In the matter of alleged non-disclosure by the applicants regarding the inoperativeness of OS 148, it is a matter of law, not of fact, and the applicants had made such disclosure, as evidenced in their submissions before the court in its *ex parte* application for the convening and restraining orders. In this case, the granting of the convening and restraining orders heavily favoured the larger group of creditors with substantial claims. Thus, the applicants had made a *bona fide* application under OS 121 for fresh convening and restraining orders, in line with the

provisions of the Companies Act and supported by judicial precedents and legislative intent. The application was not an abuse of process but a legitimate exercise of the company's rights under the law, aimed at facilitating its financial restructuring and survival. Therefore, Martin Bencher's ground to set aside the OS 121 convening and restraining orders or to be excluded from the scheme premised on the purported abuse of process was rejected. (paras 26 & 27)

(5) Filing a proof of debt constructs a legal relationship between creditor and company to have debts determined under the scheme, binding the creditor to sanctioned scheme terms. In light of Martin Bencher's failure to apply for a review of its claims and the applicants' notification to Martin Bencher that it had effectively waived its right to dispute the rejection, Martin Bencher remained a creditor in the scheme in OS 148. Given this position, the issue of whether the settlement agreement was essentially an informal exchange of letters outlining a revised payment plan for pre-existing debts or an actual settlement agreement with legal force was immaterial and did not alter Martin Bencher's status as a scheme creditor in OS 148, nor did it exempt Martin Bencher from the scheme's application. (paras 42 & 43)

(6) The applicants had incorporated the OS 148 orders into the OS 121 convening and restraining orders. It was stipulated that the Chairman is responsible for determining the amounts owed to each scheme creditor for voting purposes at the court convened meetings. For this purpose, the Chairman could consider the results of the proof of debts exercise conducted in OS 148, including admissions, rejections and any modifications made by the adjudicator in OS 148, giving the orders in OS 148 a renewed legal effect. It was not an abuse of process but rather a streamlining of proceedings and prevents unnecessary duplication of efforts for the benefit of all creditors involved. The proof of debt process initiated in OS 148 was subsequently carried over into OS 121 for practical reasons, given the substantial number of creditors involved. This continuation of the proof of debt process effectively maintained Martin Bencher's submission to the jurisdiction of the scheme even in OS 121. Thus, Martin Bencher retained its status as a creditor for the purposes of the jurisdiction of the scheme in OS 121. (paras 46 & 47)

(7) Martin Bencher's assertion that it should not be included in the scheme lacked sufficient grounds to set aside the scheme. The inclusion of Martin Bencher in the scheme parameters was not arbitrary but based on their proof of debt submissions and their prior acceptance of the scheme's jurisdiction. Changing course now to exclude Martin Bencher from the scheme would be an inequitable and improper manoeuvre. (para 48)

Case(s) referred to:

Airasia X Bhd v. BOC Aviation Ltd & Ors [2021] CLJU 188; [2021] 1 LNS 188 HC ***(refd)***
Century Services Inc v. Canada (Attorney General) [2010] 3 SCR 379 ***(refd)***
Intrakota Komposit Sdn Bhd & Anor v. Sogelease Advance (M) Sdn Bhd [2004] 8 CLJ 276 HC ***(refd)***
Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd [2001] 4 CLJ 549 CA ***(refd)***
Leadmont Development Sdn Bhd v. Infra Segi Sdn Bhd & Another Case [2018] 10 CLJ 412 HC ***(refd)***
Lehman Brothers Australia Ltd (No. 2) [2013] FCA 965 ***(refd)***
Ooi Wooi Song v. LCI Global Sdn Bhd [2020] 2 ILR 0285 ***(refd)***
Pathfinder Strategic Credit LP v. Empire Capital Resources Pte Ltd [2019] SGCA 29 ***(refd)***
Penang Port Commission v. Kanawagi Seperumaniam [2009] 1 CLJ 169 CA ***(refd)***
Primus (Malaysia) Sdn Bhd v. Rin Kei Mei & Ors [2012] 1 CLJ 176 FC ***(refd)***
Re Century Sun International Ltd [2022] HKCU 1890 ***(refd)***
Re Gold Coast Morib International Resort Sdn Bhd & Another Case [2021] CLJU 204; [2021] 1 LNS 204 HC ***(refd)***
Re Hawkair Aviation Services Ltd [2006] BCJ No. 938 ***(refd)***
Re Samgris Resources Pty Ltd (In Liquidation) [2022] QSC 126 ***(refd)***
Re Sunbird Business Services Ltd [2020] EWHC 2860 ***(refd)***
Re T&N Ltd (No. 2) [2006] 2 BCLC 374 ***(refd)***
Re Welfab Engineers Ltd [1990] BCLC 833 ***(refd)***
Sea Assets Ltd v. Perusahaan Perseroan (Persero) PT Perusahaan Penerbangan Garuda Indonesia [2001] EWCA Civ 1696 ***(refd)***
Syed Ibrahim & Co v. Trans Fame Offshore Sdn Bhd; BAP Resources Sdn Bhd & Ors (Interveners) [2022] CLJU 1412; [2022] 1 LNS 1412 HC ***(refd)***
YFG Bhd & Ors v. Insanas Enterprise Sdn Bhd & Ors [2016] CLJU 1084; [2016] 1 LNS 1084 HC ***(refd)***

Legislation referred to:

Companies Act 2016, ss. 366, 368(1), (2), 406

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JUDGMENT

Atan Mustaffa Yussof Ahmad J:

[1] This application concerns a creditor seeking exclusion from a proposed scheme of arrangement between debtor companies and its creditors. The creditor argues abuse in the scheme process due to there being an earlier proposed scheme application by the debtors. Another issue is whether the creditor, by previously filing proofs of debt to support its claims in the scheme, had submitted to the jurisdiction of the scheme process under the supervising court. With this consideration in mind, the court examines the creditor's grounds for exclusion under the scheme.

Background Facts

[2] A settlement was agreed between the intervener, Martin Bencher (Malaysia) Sdn Bhd ("Martin Bencher') and Sapura Energy Berhad, the first applicant ("Sapura Energy"), Sapura Fabrication Sdn Bhd, the third applicant ("Sapura Fabrication") and Sapura Offshore Sdn Bhd, the fourth applicant ("Sapura Offshore"). The three entities are referred to together as "the Sapura Entities."

[3] The settlement was to consolidate the separate debts owed to Martin Bencher into an agreed settlement sum of RM223,937.24, USD194,686.55 and EUR102,000 arising from two civil suits, Petaling Jaya Sessions Court Civil Suit No. BB-B52-15-10/2021 ("Suit 15") and Shah Alam High Court Civil Suit No. BA-22NCVC-482-12/2021 ("Suit 482") to be paid in seven monthly instalments from February to August 2022. Suit 15 concerns claims by Martin Bencher against Sapura Energy, Sapura Fabrication and Sapura Offshore for unpaid invoices totalling RM409,242.37 for shipping and freight services provided under three contracts. Suit 482 concerns claims by Martin Bencher against Sapura Energy and Sapura Fabrication for unpaid invoices totalling RM1,140,722.60 for shipping and freight services provided under two contracts. This settlement was arrived at after an exchange of the following correspondence: a letter from the solicitors of the Sapura Entities dated 22 February 2022, a letter from Martin Bencher's solicitors dated 22 February 2022 and a letter from the solicitors of the Sapura Entities dated 23 February 2022. The agreement to settle *via* the exchange of the three letters is referred to as the "settlement agreement."

[4] The settlement agreement contained a condition that upon any default in payment, the full outstanding amount would become immediately payable jointly and severally by the Sapura Entities. The settlement sum was to be paid in instalments jointly and severally. One EUR102,000 instalment was paid after the settlement.

[5] Meanwhile, Sapura Energy and 22 subsidiaries ("the applicants") had on 10 March 2022 obtained *ex parte* orders in Originating Summons WA-24-NCC-148-03/2022 ("OS 148") to convene creditor meetings within 12 months and restraining actions against the applicants for three months under ss. 366 and 368 of the Companies Act 2016. OS 148 was filed as the group had gone into financial difficulties and required temporary relief from legal proceedings while they attempted to formulate a proposed scheme of arrangement with creditors to restructure the financial affairs and liabilities of the distressed group. On 8 June 2022, the orders were extended by nine months until 10 March 2023. The orders are referred to as "the OS 148 convening and restraining orders." The applicants subsequently invited creditors to submit proofs of debt with a cut-off date of 31 January 2022.

[6] On 18 May 2022, Martin Bencher filed proofs of debt under OS 148. On 4 November 2022, Martin Bencher also applied to intervene in OS 148 to ensure proper debt reflection and to be placed in a suitable class. A consent order allowing intervention was recorded on 27 January 2023.

[7] With the OS 148 convening and restraining orders expiring on 10 March 2023, on 3 March 2023, the applicants obtained fresh *ex parte* orders in this originating summons ("OS 121") to convene creditor meetings within three months and restraining actions for three months starting 11 March 2023. These were extended by nine months on 6 June 2023. The orders are referred to as "the OS 121 convening and restraining orders." On 17 January 2023, Sapura Fabrication and Sapura Offshore partially rejected Martin Bencher's proofs of debt in OS 148 and no adjudicator review application in respect of the rejection was made.

[8] On 22 June 2023, Martin Bencher applied to intervene in OS 121, seeking exclusion from the proposed scheme or if not, placement in a suitable separate class. An order was recorded by consent on 12 September 2023 that leave is granted to Martin Bencher to intervene, without limitation, in respect of Sapura Energy, Sapura Fabrication and Sapura Offshore and to be at liberty to apply for any further reliefs during the course of the proceedings.

Martin Bencher's Application

[9] Martin Bencher's application in encl. 139 is for the following:

(i) leave to intervene in the proceedings without limitation and liberty to apply for further reliefs subsequently. This was given by consent;

(ii) for the OS 121 convening and restraining orders dated 8 March 2023 and 6 June 2023 and any further orders to be set aside;

(iii) for Martin Bencher to be excluded from any proposed arrangement and compromise between the applicants and their respective creditors;

(iv) for any losses suffered by Martin Bencher arising from or due to the OS 121 convening and restraining orders to be assessed and paid by the applicants; and

(v) for costs of the application to be paid by the applicants on a punitive basis.

[10] The grounds provided for this application are:

(i) the applicants filed OS 121 in abuse of process and duplicity as they have a separate ongoing originating summons in OS 148;

(ii) through the applicants' own actions, Martin Bencher ought not to have been included in any scheme in the first place.

Martin Bencher's Submissions

[11] In summary, Martin Bencher submits that it should be granted leave to intervene as it is a creditor of the Sapura Entities based on the settlement agreement.

[12] The proposed scheme in OS 121 and the OS 121 convening and restraining orders should be set aside and Martin Bencher excluded as:

(i) there is duplicity and abuse of process due to two ongoing originating summonses, OS 121 and OS 148, simultaneously. The applicants are "playing" both courts and if OS 148 was truly spent, it should have been withdrawn.

(ii) Martin Bencher should not have been included in the proposed scheme in the first place per the applicants' own criteria, including the 31 January 2022 cut-off date for debts whereas the settlement agreement is dated 23 February 2022.

(iii) the applicants have maintained contradictory positions, *ie*, acknowledging Martin Bencher as a creditor in OS 148 and consenting to its intervention on this basis, while simultaneously disputing Martin Bencher's similar creditor status in OS 121, thereby presenting inconsistent arguments in separate legal proceedings.

[13] Martin Bencher wishes to have no part in what it terms the applicants' "machinations".

The Applicants' Submissions

[14] In summary, the applicants submit that:

(i) the OS 148 convening and restraining orders had expired on 10 March 2023 and were superseded by the OS 121 convening and restraining orders. Hence, there was no duplicity or abuse of process as there were no simultaneous live proceedings;

(ii) fresh applications for convening and restraining orders are allowed under the law. A previous scheme being superseded by a fresh scheme is also recognised by case law in various jurisdictions;

(iii) withdrawing OS 148 was not possible as it was spent upon the expiry of the orders. In any case, granting fresh orders promotes the purpose behind schemes of arrangements in saving the companies from liquidation;

(iv) Martin Bencher participated in the proof of debt exercise in OS 148 and thus subjected itself to the jurisdiction of the scheme and adjudication process which carries over to OS 121. Its status as creditor and debt claims must be determined accordingly, not in separate legal proceedings;

(v) Martin Bencher has been correctly classified as an unsecured creditor based on its contractual claims. The cut-off date does not apply since the settlement agreement only rescheduled existing debts.

Analysis And Findings Of The Court

Abuse Of Process

[15] Martin Bencher submits that the applicants' sole purpose in approaching this court is to secure a restraining order, as admitted in their documents. It is maintained by Martin Bencher that despite the applicants' claim of no duplicity, their actions in simultaneously engaging in two court proceedings indicate otherwise. Martin Bencher contends that such concurrent proceedings, particularly when one is left unresolved, constitute an abuse of the court's process, referencing the cases of *Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd* [2001] 4 CLJ 549 and *Penang Port Commission v. Kanawagi Seperumaniam* [2009] 1 CLJ 169; [2008] 6 MLJ 686. Furthermore, Martin Bencher argues that if the applicants truly considered OS 148 as redundant, it should have been formally withdrawn. In light of these contentions, Martin Bencher seeks to be excluded from the scheme in OS 121 and/or the OS 121 convening and restraining orders, distancing itself from what it perceives as judicial abuse.

[16] The applicants submit that their actions concerning OS 121 and the OS 121 convening and restraining orders do not constitute an abuse of court process. It is maintained by the applicants that the OS 148 convening and restraining orders have expired and were rightly superseded by the OS 121 convening and restraining orders. The applicants contend that this transition does not equate to duplicity of proceedings, as the orders from OS 148 are no longer operative. They argue that the law does not prohibit the filing of a fresh application for convening and restraining orders, citing various cases to support their position that such actions are permissible under specific circumstances, including changes in restructuring plans. Furthermore, the applicants emphasise that the purpose of these orders is to protect companies and their restructuring process from being derailed by individual creditors, highlighting the overarching goal of corporate rehabilitation and the avoidance of liquidation.

[17] Upon thorough examination of the submissions and supporting documents, it is clear that the OS 148 convening and restraining orders, which were subject to a time-bound effectiveness, had expired on 10 March 2023. This expiry was confirmed in the decision of Justice Adlin binti Abdul Majid, who allowed Martin Bencher to withdraw its application in OS 148, thereby acknowledging that the orders under OS 148 were no longer operative. This expiration negates Martin Bencher's argument of duplicity in proceedings, as by the time OS 121 was initiated, OS 148 had ceased to have any legal effect.

[18] After considering the submissions, the court finds that the applicants' application under OS 121 is for fresh convening and restraining orders, as per ss. 366 and 368 of the Companies Act 2016, are distinct from those granted under OS 148. The fresh application does not merely extend the previous orders but represents a new phase in the corporate restructuring process, justified by changes in the restructuring plans and the financial conditions of the company. This approach is supported by various legal precedents, including *Pathfinder Strategic Credit LP v. Empire Capital Resources Pte Ltd* [2019] SGCA 29, a judgment from the Singapore Court of Appeal, which validates the filing of new applications under changed circumstances. In *Pathfinder Strategic Credit LP*, Sundaresh Menon CJ held that there was no abuse merely because there were three prior applications by the company:

> [95] In that light, we consider that there is insufficient evidence in the present circumstances to warrant a finding that Empire Capital's present leave application amounts to an abuse of process. Amongst other things, although this is the Berau Group's fourth set of restructuring proceedings in Singapore (see [15] and [16] above), there have been genuine changes in the restructuring plans put forward in the various applications, ...

[19] In other jurisdictions, courts have shown flexibility in allowing fresh applications for convening orders in the context of corporate restructuring schemes, particularly when previous attempts have failed due to various reasons. For instance, in Hong Kong, the case of *Re Century Sun International Ltd* [2022] HKCU 1890 demonstrated this approach when a scheme failure was attributed to inadequate information in the explanatory statement. Similarly, in the UK, the *Re Sunbird Business Services Ltd* [2020] EWHC 2860 (Ch) case allowed a renewed application of an identical scheme after the initial application was marred by the provision of misleading information by the applicant. Moreover, in Australia, the case of *Lehman Brothers Australia Ltd (No. 2)* [2013] FCA 965 highlighted a scenario where a scheme was abandoned due to the inability to reach a compromise with creditors, yet a fresh application was permitted. These examples illustrate a trend towards accommodating repeated efforts in corporate restructuring, provided there are valid reasons for the failure of initial attempts.

[20] Furthermore, the legislative intent behind the Companies Act 2016, as elucidated in various judicial interpretations, inclines towards facilitating corporate reorganisations to avoid liquidation. This objective is underscored by precedents like *Re Hawkair Aviation Services Ltd* [2006] BCJ No. 938, which interprets the Canadian CCAA as remedial legislation deserving of a liberal interpretation to facilitate arrangements between companies and creditors. Similarly, *Century Services Inc v. Canada (Attorney General)* [2010] 3 SCR 379 and *Re Welfab Engineers Ltd* [1990] BCLC 833 advocate for saving businesses and considering creditors' interests. Cases from the Malaysian jurisdiction like *Intrakota Komposit Sdn Bhd & Anor v. Sogelease Advance (M)*

Sdn Bhd [2004] 8 CLJ 276 and *YFG Bhd & Ors v. Insanas Enterprise Sdn Bhd & Ors* [2016] CLJU 1084; [2016] 1 LNS 1084; [2016] MLJU 664 emphasise the importance of avoiding liquidation to preserve viable businesses. Additionally, *Sea Assets Ltd v. Perusahaan Perseroan (Persero) PT Perusahaan Penerbangan Garuda Indonesia* [2001] EWCA Civ 1696 and *Re T & N Ltd (No. 2)* [2006] 2 BCLC 374 reflect a longstanding legislative policy favouring compromises and arrangements over liquidation. Such an approach is confirmed by *Airasia X Bhd v. BOC Aviation Ltd & Ors* [2021] CLJU 188; [2021] 1 LNS 188; [2021] 10 MLJ 942 and *Primus (Malaysia) Sdn Bhd v. Rin Kei Mei & Ors* [2012] 1 CLJ 176, highlighting the primary objective of s. 366 of the Companies Act 2016 to facilitate restructuring plans, thereby continuing business operations and benefiting creditors. Therefore, restricting applications beyond the one-year period prescribed in s. 368(1) would contradict these objectives, potentially defeating the purpose of scheme provisions in the Companies Act 2016 designed to save companies.

[21] The act does not explicitly prohibit consecutive applications for convening and restraining orders, provided each application is justified and meets the statutory requirements. The fresh application by the applicants under OS 121, therefore, adheres to the spirit of the legislation, which is aimed at providing companies with an opportunity to revive and restructure in the face of financial distress.

[22] The court acknowledges the fresh application by the applicants for a restraining order pursuant to s. 368(2) of the Companies Act 2016, even in light of the previous restraining order that had been granted and has since expired. The Companies Act 2016, in sub-s. (2), lays down specific conditions under which the restraining order can be granted and possibly extended. As the applicants have presented their case, they seem to have satisfied the conditions mentioned in the Companies Act 2016. Yet, there is no reported authority concerning a fresh restraining order following the conclusion of the three-month initial period, plus the nine-month extension, as outlined in s. 368(2) of the Companies Act 2016, similar to the one procured by the applicants in this instance.

[23] Turning to the High Court case of *Syed Ibrahim & Co v. Trans Fame Offshore Sdn Bhd; BAP Resources Sdn Bhd & Ors (Interveners)* [2022] CLJU 1412; [2022] 1 LNS 1412; [2023] 7 MLJ 399, the court dealt with a similar scenario regarding the duration and expiration of a judicial management order (JMO) under s. 406 of the Companies Act 2016. In this case, the court adopted a purposive approach in interpreting s. 406 of the Companies Act 2016, as evidenced in *Re Gold Coast Morib International Resort Sdn Bhd & Another Case* [2021] CLJU 204; [2021] 1 LNS 204; [2021] MLJU 126. The court focused on the legislative intent, emphasising that a JMO is strictly valid for six months, extendable by another six months upon application.

The use of 'shall' in the statute signifies the mandatory nature of this duration. Furthermore, the court held that if the objectives of the JMO – ensuring the company's survival or achieving a more advantageous asset realisation than in a winding-up – are not met within this timeframe, the JMO should be terminated. Despite this, the court clarified that the expiration of an initial JMO does not preclude the filing of a new judicial management application, as long as it conforms to the conditions set by the court, aligning with the purposive and pragmatic interpretation of the law. Nadzarin Wok Nordin J stated:

> [17] In *Re Gold Coast Morib International Resort Sdn Bhd and another case* [2021] MLJU 126 this court had considered and decided the effect of s 406 of the Companies Act 2016 and held:
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> > [29] Under s 406(1) of the Companies Act 2016, the duration of the JMO is stated to be:
> >
> > > (1) A judicial management order shall remain in force for a period of six months from the date of the making of the order, unless the judicial management is otherwise discharged, but the Court may, on the application of a judicial manager, extend this period for another six months subject to such terms as the Court may impose.
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> [30] By the word 'shall' in the said s. 406(1) of the Companies Act 2016, it is clearly parliament's intent to make it mandatory that such a JMO is to be in force or in other words, valid for a period of only six months from the date of the making of the order. Such JMO will from the natural and ordinary meaning of the words in the said sub section be, in this courts view, immediately terminated on such date unless the JMO is either:
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> (a) discharged or
>
> (b) extended for a period of another 6 months on the application of a judicial manager
>
> [31] On the trite principle that parliament does not legislate in vain, and by adopting a purposive approach as to the intent of Parliament, I hold that by an examination of the language used in s. 406(1) of the Companies Act 2016 and Division 8 Sub Division 2 of the Companies Act 2016 as a whole, the intent of parliament is to end the judicial management if the purpose of the JMO being to achieve the survival of the company as a going concern and/or that a more advantageous realisation of the company's assets would be effected than on a winding up cannot be achieved within the initial six month period under s. 406(1) of the Companies Act 2016.
>
> [18] From the decision in the above said case, I hold that although the initial judicial management order in OS 21 has expired on 9 December 2021, and thus the said judicial management order in OS 21 is brought to an end, I hold that the said s. 406 of the Companies Act 2016 does not bar a fresh application for judicial management being made subject to the conditions this court has mentioned above.

[24] It is clear from the *Syed Ibrahim & Co* decision that while a JMO has a stipulated duration, the expiration of one does not, in itself, prohibit the possibility of making a fresh application.

[25] Drawing parallels between the JMO under s. 406 and the restraining order under s. 368(2), it can be inferred that while the Legislature has mandated certain time limits, it does not necessarily imply a bar against subsequent or fresh applications. Adopting a purposive approach, this court recognises the underlying intent of the Legislature, which leans towards ensuring the survival of the company in challenging times, while also safeguarding creditors' interests. The expiration of a previous order does not signify an absolute end but rather provides an opportunity for reassessment based on new circumstances and requirements.

[26] In the matter of alleged non-disclosure by the applicants regarding the inoperativeness of OS 148, it is a matter of law, not of fact, and the applicants have made such disclosure, as evidenced in their submissions before the court dated 7 March 2023, in its *ex parte* application for the convening and restraining orders. The principle of non-disclosure of material facts, as in *Leadmont Development Sdn Bhd v. Infra Segi Sdn Bhd & Another Case* [2018] 10 CLJ 412; [2019] 8 MLJ 473, does not automatically result in the setting aside of an application but requires a balancing of interests. In *Leadmont*, the court, in considering an application for the setting aside judicial management orders, observed that the applicants owed a duty of full and frank disclosure in *ex parte* proceedings but non-disclosure does not automatically invalidate orders, which must balance the interests of the company and creditors. In this case, the granting of the convening and restraining orders heavily favours the larger group of creditors with substantial claims.

[27] In conclusion, this court finds that the applicants, have made a *bona fide* application under OS 121 for fresh convening and restraining orders, in line with the provisions of the Companies Act 2016 and supported by judicial precedents and legislative intent. The application is not an abuse of process but a legitimate exercise of the company's rights under the law, aimed at facilitating its financial restructuring and survival. Therefore, Martin Bencher's ground to set aside the OS 121 convening and restraining orders or to be excluded from the scheme premised on the purported abuse of process is rejected.

Filing Of Proofs Of Debt In OS 148

[28] Martin Bencher submits that it is not a creditor of Sapura Energy, Sapura Fabrication and Sapura Offshore for the purpose of the scheme in OS 121. Martin Bencher contends that the settlement agreement consolidated debts owed by Sapura Energy, Sapura Fabrication and Sapura Offshore into agreed debts and the settlement agreement recorded a global settlement for ongoing suits between Martin Bencher and Sapura Energy, Sapura

Fabrication and Sapura Offshore. In OS 148, the proposed scheme that was introduced invited creditors to submit proof of debts with a cut-off date of 31 January 2022. Martin Bencher stated that it complied with this in good faith and filed its proofs of debt ("PODS") on 18 May 2022. It also sought to intervene in OS 148 to ensure fair processes. In January 2023, Sapura Fabrication and Sapura Offshore rejected Martin Bencher's proof of debts. Now, in OS 121, the applicants have treated Martin Bencher as a creditor for the purpose of the scheme. Martin Bencher contends that the applicants have lodged OS 121 in an abuse of process and in duplicity of proceedings, as it has an ongoing originating summons *vide* OS 148. Martin Bencher argues that through the applicants' own actions, it ought never to have been included in any scheme in the first place.

[29] The central issue in this matter is therefore whether Martin Bencher should be excluded from the scheme and not bound by the OS 121 convening and restraining orders due on the basis that its debt falls outside the specified cutoff date. Martin Bencher argues that the settlement agreement is dated 23 February 2022 and this postdates the cut-off date of 31 January 2022, which is now applied by the applicants in OS 121.

[30] The court will now consider whether Martin Bencher's position is correct.

[31] As a starting point to this analysis, it is important to consider the basis Martin Bencher filed its PODs in the earlier OS 148. These were filed on 18 May 2022 with the understanding that it was claiming for debts that had arisen prior to 31 January 2022, the cut-off date that was stipulated in the OS 148 proposed scheme.

[32] However, Martin Bencher's argument is that the PODs were based on a debt that it is claiming against Sapura Energy, Sapura Fabrication and Sapura Offshore based on a consolidated and crystalised sum under the settlement agreement acknowledging their earlier debts. This argument cannot be sustained. This is because the proof of debt process in OS 148 did not allow for debts arising after 31 January 2022 to be claimed. Martin Bencher could not have been claiming for a debt based on the settlement agreement which was executed on 23 February 2022 after the cut-off date of 31 January 2022. The claim could only have been based on debts arising earlier.

[33] It is important to examine the timeline of events relating to Martin Bencher's submission of the PODs. Martin Bencher, as a scheme creditor in OS 148, submitted PODs to Sapura Energy, Sapura Fabrication and Sapura Offshore on 18 May 2022. Subsequently, on 17 January 2023, Sapura Offshore and Sapura Fabrication issued notices of partial admission of proof of debt to Martin Bencher. These notices detailed the admitted and rejected portions of Martin Bencher's claims.

[34] In Sapura Fabrication's notice dated 17 January 2023, it was stated that Martin Bencher's claim was partially admitted and partially rejected. The admitted claim against Sapura Fabrication was for an amount of RM823,669.66, equivalent to RM194,611.64 and USD150,061.55, while the rejected claim amounted to RM216,393, the equivalent of RM29,325.60 and USD44,625. The notice also included instructions for the adjudication process for the rejected claims, including the appointment of an independent adjudicator and the process for submitting an application for review.

[35] In Sapura Offshore's notice dated 17 January 2023, it was stated that a partial admission and rejection of a proof of debt claim was made by Sapura Offshore. The admitted claim amounted to RM216,393.60, equivalent to USD44,625 and RM29,325.60. Conversely, the rejected claim was RM823,669.66, equivalent to USD150,061.55 and RM194,611.64. The notice also outlined the adjudication process for rejected claims, including the appointment of an independent adjudicator and instructions for submitting a review application.

[36] Paragraph 2.1 of the terms of reference for the adjudicator in OS 148 explicitly granted Martin Bencher a 14-day window to apply to the adjudicator to review its claims upon receiving these notices. Paragraph 2.1 reads:

> 2.1. A Scheme Creditor or the relevant Scheme Entity shall be entitled, within fourteen (14) calendar days of receiving the Notice of Admission or Rejection of Proof of Debt by the Chairman, to apply to the Adjudicator to review its claim (such Scheme Creditor as "Disputing Scheme Creditor" and such claim as "Disputed Scheme Claim") by:
>
> (a) submitting a written request in Form A with the supporting documents, comprising a copy of:
>
> (i) the Proof of Debt submitted by the Disputing Scheme Creditor;
>
> (ii) the supporting documents submitted in support of the Proof of Debt; and
>
> (iii) the Notice of Admission or Rejection of Proof of Debt.
>
> (b) making payment of a refundable deposit of the fees of the Adjudicator in the sum representing the Adjudicator's fees which would be payable under paragraph 4.1 below ("Disputing Scheme Creditor's Deposit").

[37] However, Martin Bencher chose not to avail itself of this opportunity and instead issued a letter to the applicants' solicitors on 30 January 2023, asserting that the rejection of its PODs was without just cause, considering it as a breach of the settlement agreement.

[38] In response to Martin Bencher's failure to file an application for the review of its claims, the applicants informed Martin Bencher on 9 February 2023 through their solicitor that Martin Bencher did not submit an application to review the claim by the deadline, thereby waiving their right to dispute the notices and accepting the Chairman's decision.

[39] Martin Bencher argues that the settlement agreement is not merely a revised payment schedule of the debts of Sapura Energy, Sapura Fabrication and Sapura Offshore but is actually an agreement between Martin Bencher and Sapura Energy, Sapura Fabrication and Sapura Offshore which has legal force. However, the court does not find this to be relevant given that Martin Bencher had already submitted PODs for debts accruing before the cut-off date, thereby establishing themselves as scheme creditors and subjecting themselves to the scheme's jurisdiction in OS 148. The Industrial Court case of *Ooi Wooi Song v. LCI Global Sdn Bhd* [2020] ILRU 0285; [2020] 2 ILR 0285; [2020] ILJU 74, demonstrates that a creditor who submits a proof of debt to the company constructs a legal relationship with the company to be governed by an approved scheme of arrangement, binding that creditor to the scheme. In this case, the Industrial Court held that when the claimant filed a proof of debt to the company, *via* the Insolvency Department, he submitted to the jurisdiction of the sanctioned scheme and was therefore bound by its terms, unable to pursue separate legal remedies for non-compliance outside the scheme. I accept this to be the correct position in law.

[40] Further, by analogy in the insolvency context, the Australian Supreme Court case of *Re Samgris Resources Pty Ltd (In Liquidation)* [2022] QSC 126 demonstrates that by lodging a proof of debt, a potential creditor submits to the jurisdiction of a court – supervised process. In this case, a creditor, APJM, had submitted a proof of debt in Samgris' liquidation seeking to recover unpaid investments in the context of company liquidation. This proof of debt was rejected by the liquidators. By submitting the proof, APJM had submitted itself to the statutory insolvency scheme for the determination and resolution of creditor claims against Samgris.

[41] The court held that having submitted a proof of debt, APJM was bound by the liquidators' decision to reject it, subject to APJM's right under the statute to appeal that rejection. However, APJM chose not to appeal. Further, APJM could not then dispute in separate foreign proceedings that debts were owed to it, as within the insolvency proceedings supervised by the Australian courts, the issue of debts owed to APJM had already been conclusively determined.

[42] This principle applies equally when a proof of debt is submitted in a scheme of arrangement. Filing a proof of debt constructs a legal relationship between the creditor and the company to have debts determined under the scheme, binding the creditor to sanctioned scheme terms.

[43] In light of Martin Bencher's failure to apply for a review of its claims and the applicants' notification to Martin Bencher that it had effectively waived its right to dispute the rejection, Martin Bencher remained a creditor in the scheme in OS 148. Given this position, the issue of whether the settlement agreement was essentially an informal exchange of letters outlining a revised payment plan for pre-existing debts or an actual settlement agreement with legal force is immaterial and does not alter Martin Bencher's status as a scheme creditor in OS 148, nor does it exempt Martin Bencher from the scheme's application.

[44] As Martin Bencher remained a creditor in the OS 148 scheme, what is the implication for Martin Bencher in OS 121? The court considers this position next.

Whether Martin Bencher Is Subject To The Scheme's Jurisdiction In OS 121

[45] Next, the court addresses Martin Bencher's arguments that the OS 148 convening and restraining orders which are spent cannot apply in the subsequent OS 121. Martin Bencher posits that the OS 148 convening and restraining orders are no longer inoperative and no longer enforceable by Sapura.

[46] However, it is noteworthy that the applicants have incorporated the OS 148 orders into the OS 121 convening and restraining orders. In Annexure A of the order dated 8 March 2023, in paras. 12 and 13, it is stipulated that the Chairman is responsible for determining the amounts owed to each scheme creditor for voting purposes at the court-convened meetings (para. 12). For this purpose, the Chairman can consider the results of the proof of debts exercise conducted in OS 148, including admissions, rejections, and any modifications made by the adjudicator in OS 148 (para. 13), giving the orders in OS 148 a renewed legal effect. Paragraph 12 reads:

> 12. The Chairman shall determine the amounts due to each Scheme Creditor for voting purposes at the Court-Convened Meetings.
>
> 13. For the purpose of such determination, the Chairman is entitled to rely on the outcome of the proof of debts exercise conducted in the OS No. WA-24NCC-148-03/2022, including any admission or rejection of the proof of debts by the Chairman in the said exercise and any variation to his decision by the Adjudicator in OS No. WA-24NCC-148-03/2022.

[47] While at first blush, this may appear contradictory and indicate multiplicity, the court does not find it to be an abuse of process but rather a streamlining of proceedings and prevents unnecessary duplication of efforts for the benefit of all creditors involved. The court acknowledges that the proof of debt process initiated in OS 148 was subsequently carried over into OS 121 for practical reasons, given the substantial number of creditors

involved. This continuation of the proof of debt process effectively maintains Martin Bencher's submission to the jurisdiction of the scheme even in OS 121. Thus, Martin Bencher retains its status as a creditor for the purposes of the jurisdiction of the scheme in OS 121.

[48] Martin Bencher's assertion that it should not be included in the scheme lacks sufficient grounds to set aside the scheme. The court recognises that the inclusion of Martin Bencher in the scheme parameters was not arbitrary but based on their proof of debt submissions and their prior acceptance of the scheme's jurisdiction. Changing course now to exclude Martin Bencher from the scheme would be an inequitable and improper manoeuvre.

Conclusion

[49] In the premise, given the court's findings that the application is not an abuse of process and Martin Bencher is subject to the scheme's jurisdiction in OS 121, encl. 139 is dismissed with costs. The court orders costs of RM2,000 against Martin Bencher.